

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of) MB Docket Nos. 04-55, 04-56, 04-57,
) 04-58, 04-59, 04-60, 04-61, 04-62, 04-63,
Digital Output Protection Technology and) 04-64, 04-65, 04-66, 04-68, 02-230
Recording Method Certifications)
) CS Docket 97-80
All Technologies and Recording Methods)
) PP Docket 00-67

Reply Comments of Public Knowledge and Consumers Union

Public Knowledge and Consumers Union (hereafter “Consumer Groups”) hereby submit these comments in reply to oppositions in connection with the Commission’s *Certifications for Digital Output Protection Technologies and Recording Methods to be Used in Covered Demodulator Products* FCC DA 04-715 (released Mar. 17, 2004) in the above captioned proceedings.

The Commission’s interim procedure for approving broadcast-flag compliant technologies and recording methods is the first step into a new world in which digital television products and related devices are required by a government mandate to include redistribution controls. The Consumer Groups urge the Commission to take this first step carefully; mindful of the lasting impact these first technology approvals will have on the future of digital television (DTV) and consumers. This interim procedure can permit a world of attractive consumer products and functionality but must do so in a way that will not “lock-down” innovation and technologies that might attract consumers to DTV.

I. The Commission Should Adhere to Its Technology Approval Guidelines and the Broader Goals of the Broadcast Flag Regulation.

The Consumer Groups reiterate our earlier comments that every element of the broadcast flag proceeding presents an opportunity for “mission creep”¹ – the expansion of the broadcast-flag regulations well beyond the Commission’s limited goal of preventing indiscriminate redistribution of DTV content. We encourage the Commission to adhere to its approval guidelines² and to remain mindful of the concerns stated in the order.³

The Commission’s interim guidelines for approval of technologies provide an expedited procedure to permit new DTV products to enter the marketplace and ultimately promote the transition to DTV. Under the Commission guidelines these technologies must adequately meet the larger goal of preventing indiscriminate redistribution of DTV content, *but from a consumer perspective, interoperability, compatibility, and the accommodation of reasonable uses and enjoyment are equally, if not more, important*. We are encouraged that the Commission will consider these elements in the interim approval process and we hope that the Commission will strike a proper balance between content redistribution control and consumer enjoyment of new products.

Clearly the prevention of indiscriminate redistribution need not mean the prevention of new functionality and increased content use flexibility. The Commission stated, “we anticipate that technologies can protect content while facilitating consumer uses and practices.”⁴ The same characteristics of digital content and technologies that may make it easier to indiscriminately

¹ Reply Comments of Public Knowledge and Consumers Union, MB Docket 02-230, at 3-6 (Mar. 15, 2004).

² § 73.9008

³ In The Matter of Digital Broadcast Content Protection, *Report and Order and Further Notice of Proposed Rulemaking*, MB Docket 02-230, (Nov. 4, 2003) [hereinafter *Report and Order*].

⁴ *Report and Order* ¶ 55.

redistribute content also provide an opportunity to present consumers with new functionality not feasible in the analog environment. For example, TiVo and Thomson both propose technologies that are designed to limit indiscriminate redistribution yet enable consumers to easily transfer and view recorded DTV content for personal use on a variety of platforms and in a variety of locations. ***Just as the case is with analog television, the DTV experience need not be tethered to a home monitor or home receiver – today consumers can take video tapes on vacation or send them to another location for viewing.*** In addition, if consumers are going to transition to a new technology they will expect the added features and ease that these new technologies can provide.

Watching recorded DTV content transmitted for personal use to a location away from the home – *e.g.* while traveling on business, at work, or on vacation – does not make the consumer a “retransmitter” or “rebroadcaster” any more than taking a video cassette tape recording to one of those locations does. These new methods of transporting or transmitting recorded content are precisely the type of flexibility that consumers will expect with DTV content and that new DTV-related technologies can enable. The Commission should promote rather than discourage or delay technologies that enable consumers to transfer content for personal use, via the Internet or otherwise.

The Commission stated its goal of preventing indiscriminate redistribution: “will not (1) interfere with or preclude consumers from copying broadcast programming and using or redistributing it within the home or similar personal environment as consistent with copyright law, or (2) foreclose use of the Internet to send digital broadcast content where it can be adequately protected from indiscriminate redistribution.”⁵ It is vital that the Commission continue to recognize the difference between indiscriminate redistribution and the transfer of

⁵ *Report and Order* ¶ 10.

recorded content for personal use. The fact that a technology permits the transfer of recorded DTV content does not logically entail that it will permit indiscriminate redistribution. Our understanding of a number of the proposed technologies supports this notion; these technologies, utilizing rights management and related technologies, allow content transfer for personal use, but they do not permit indiscriminate redistribution.

Should the Commission follow its own guidelines for interim approval, it will approve new technologies that encourage consumers to transition to DTV. This is not the time to foster or allow delay. This interim process will set the tone for all future approvals and the future landscape of DTV. The Commission must ensure that the first new DTV-related products facilitate and encourage the reasonable expectations of consumers. Halting indiscriminate redistribution need not equate with limiting consumer use and stopping the innovative functionality that new DTV-related products can offer.

II. The Commission Must Not Grant the MPAA a Private Regulatory Authority by Adding New Requirements for Technology Approval.

The Commission stated: “we are concerned with one industry segment exercising a significant degree of control over decisions regarding the approval and use of content protection and recording technologies in DTV-related equipment.”⁶ In light of this reservation, the Commission should resist the request to expand the scope of certification requirements proposed by the Motion Picture Association of America, Inc. *et. al.* (MPAA, *et. al.*)⁷ and it should not grant the MPAA, *et. al.* a second chance to create guidelines for acceptable technologies. No single industry should be given private regulatory authority in these proceedings.

It is not appropriate or necessary to require “proximity control” or distance or geographic limitations on the transmission of DTV content – no such controls exist now with

⁶ Report and Order ¶ 52.

⁷ Opposition to the Application of [Thomson, TiVo, RealNetworks, Microsoft] for Interim Authorization by MPAA, *et. al.*, MB Dockets 04-59, 04-63, 04-65, 04-66 (April 6, 2004).

video cassettes and other analog media. The Commission made clear that it wishes to target indiscriminate redistribution, yet the MPAA, *et. al.* now wish to add limits on the functioning of new technologies which would limit the playback of recorded DTV content to one's home. Not only is this extreme limitation nowhere to be found in the Commission's interim approval guidelines, but it goes against the Commission's own desires to permit the transmission of content for personal use via the Internet or through other means.⁸ Finally, proximity control goes against the experience consumers have with enjoyed with their analog content – it is a step back.

The Consumer Groups recognize that allowing the digital transfer of DTV content may present a greater challenge for redistribution control, but there is no reason to presume that the proposed technologies have not met this challenge. The MPAA, *et. al.* state that the challenges associated with personal affinity-based systems are too difficult to consider in this proceeding. The entire broadcast flag proceeding presents difficult challenges, but difficulties should not prevent the advance of technology and new products that could speed the transition to DTV. The Commission must face this challenge now. Delay in the form of adding a new certification guideline or giving in to “difficulties” or the demands of one industry is not something the transition to DTV can afford.

Although these proceedings are labeled as “interim” the reality is that the Commission's certification decisions will dictate the landscape of DTV-related products for a significant period of time, well beyond the deadline for the transition to DTV. The Commission should encourage innovative technologies that take advantage of DTV, but revisiting the guidelines during the approval procedure at the behest of one industry will only stall the advance of attractive consumer technologies and new DTV-related products.

⁸ See *Report and Order* ¶10.

III. Conclusion

The Commission faces an important step towards the transition to DTV with the interim certifications for broadcast flag technologies. This step should balance the goal of the Commission to stop indiscriminate redistribution with the need for innovative technologies that can attract and compete for consumers' DTV business. The Commission should adhere to its established guidelines for technology approval and reject requests that would delay the introduction of new technologies and functionality. We look forward to working with the Commission as it applies the interim approval guidelines and as it seeks to ensure consumers receive the DTV-related products they expect.

Respectfully Submitted,

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April 16, 2002